U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: September 28, 2001

BALCA Case No. 2000-INA-116
[ETA No. P1997-NY-02107232]

In the Matter of:

MIROSLAW KUSMIREK,
Employer,

on behalf of

HALINA HOROSZKO,
Alien

Certifying Officer: Dolores DeHaan, New York, NY

Appearances: Tadeusz Kucharski
Brooklyn, NY
For Employer

Before: Burke, Chapman, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER
AND
ORDER TO SHOW CAUSE

This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review and

any written arguments. 20 C.F.R. 656.27(c).

I. DECISION ON THE MERITS

STATEMENT OF THE CASE

On November 1, 1996, Employer, Miroslaw Kusmirek, filed an Application for Alien Employment Certification seeking to fill the position of "Domestic Cook (Live-out)." (AF 1-4). The duties were listed as follows:

> Prepare and cook Polish meals including: Pierogies, Stuffed Cabbage, Borscht, Cold Beet Soup, Tripe, Kolduny, Bigos, Kopytka, Pyzy, Blintzes, Dumplings, Beef Tartar style, etc. Purchase foodstuff, Clean kitchen.

(AF 4). Employer required two years of experience in the job offered. *Id*.

On January 19, 1999, the CO issued its first Notice of Findings (hereinafter "NOF #1"), noting that "the requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement." (AF 27). The CO, therefore, advised Employer to either delete the restrictive requirement calling for the applicant to have two years of specialized experience in the preparation of Polish food or submit evidence to show that a business necessity warranted the requirement pursuant to §656.21(b)(2). (AF 26-27). The CO also questioned whether the position constituted full-time employment under § 656.3. (AF 27-28).

Employer filed his Rebuttal (hereinafter "Rebuttal #1") to the NOF on January 27, 1999. (AF 23-33). Rebuttal #1 primarily supplied answers to the questions posed in the NOF relating to the full-time employment issue. However, Employer did state that because 75-80% of his customers are Polish in origin, he is obliged to serve them high quality Polish food. (AF 44). Employer also included a copy of his entertainment schedule for the preceding year, detailing the number and type of meals served as well as the number of guests present. (AF 31-42). Employer appears to have hosted company at least three times a week in 1998. *Id.*

Then, in response to Employer's answers in Rebuttal #1 and the issuance of the *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*) decision, the CO issued a second NOF (hereinafter "NOF #2") on May 18, 1999. (AF 46-49). In NOF #2, the CO indicated that Employer failed to show that the position created a bona fide job opportunity pursuant to 20 CFR §656.20(c)(8) and then identified additional questions for Employer to answer. (AF 47-48). The CO did not mention the business necessity deficiency in this document.

Consequently, Employer submitted a second Rebuttal (hereinafter "Rebuttal #2") on June 11, 1999 (AF 78-92), which included a copy of an entertainment schedule detailing events held from October 1995 through November 1996.

On August 19, 1999, the CO issued her Final Determination ("FD"), finding that Employer provided sufficient evidence to establish the existence of a bona fide job opportunity, but also finding that Employer failed to submit requested evidence to support the business necessity of the ethnic cooking requirement. (AF 76-77).

On December 7, 1999, Employer filed a Request for Administrative Judicial Review of Denial of Labor Certification. (AF 112-113). After the case was docketed, Employer informed the Board that he would not submit a statement or brief due to the fact that the grounds for appeal had already been stated in his rebuttals.

DISCUSSION

In *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*), the Board held that "cooking specialization requirements for experience in specific styles or types of cuisine are unduly restrictive within the meaning of the regulation at section 656.21(b)(2), and therefore must be justified by business necessity." *Kaplan*, 2000-INA-23 slip op. at 3. To establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In the context of domestic cook specialization requirements, the first prong of the business necessity test may often focus on how the cooking specialization is related to the family's need for a cook. The second prong of the test may often focus on whether the length of experience stated by the employer as a job requirement is required to be able to cook the specialized cuisine. *Kaplan, supra* slip op. at 10.

In the NOF, the CO informed Employer that he may rebut her finding that the requirement for a cook with two years' experience preparing Polish cuisine was unduly restrictive by providing evidence that:

> 1) The job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer; and
>
> 2) The job as currently described existed before the employer filed the application for labor certification.

(AF 27).

Employer, however, failed to provide any such evidence to establish that the job requirements are essential to the performance of the job duties. Neither Rebuttal # 1 or #2 supply proof that an otherwise experienced domestic cook is able to learn Polish cooking within a reasonable period of

taking the job. A supplemental rebuttal to Rebuttal #2, titled "Rebuttal(2)," does chronicle Employer's past experiences of hiring professional cooks without significant experience in Polish-style cooking and avers that his clients "were so disappointed [with the food] that they refused to eat served food and left early before [he] had a chance to start business conversation." (AF 102). Normally, an employer's unsupported assertions are not sufficient to carry its burden of proof, but are evidence that must be considered and given the weight it rationally deserves. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Nevertheless, Employer's statement carries little weight because without supporting reasoning or concrete evidence it still fails to show that a cook without prior experience in the preparation of Polish cuisine cannot learn how to cook this cuisine within a reasonable period of taking the job.

Employer also stated in Rebuttal #1 that it is impossible for anyone in the household to train a cook and in the event that it were possible, Employer could "not afford to subject [his] important clients to the inevitable mistakes during learning [sic] period which could have disastrous consequences." (AF 44). Incapacity to provide training does not furnish evidence relating to the length of time it takes to gain competency in Polish cooking. Thus, in light of the foregoing, the two year specialization requirement remains unduly restrictive since Employer has not sufficiently linked the requirement to successful execution of the job.

II. APPARENT MISREPRESENTATIONS/ORDER TO SHOW CAUSE

In the course of reviewing this appeal, the Panel has found the following irregularities in Employer's appeal file:

1) Employer's address on the original ETA-750B form (AF 2) differs from the one listed on a revised copy of the form. (AF 107).

2) The cover letter to the ETA-750 forms (AF 7-8) as well as the Rebuttal (AF 43-45, 92-93) maintain that Employer is married with two young children. It also states that Employer's mother-in-law and niece live with Employer.

3) In a letter dated April 23, 1997, Employer withdrew his labor certification application. (AF 19). On August 20, 1998, the DOL sent a letter to the Employer's representatives acknowledging the withdrawal of the application. (AF 23). On September 25, 1998, the Employer's representative requested that the application be reinstated (AF 25), attaching a letter purportedly signed by the Employer, explaining that family problems prompted the request for withdrawal and that "[t]ogether with my wife we are very much interested in speedy decision of this case." (AF 24).

4) On Employer's 1996 tax return, submitted per the CO's request, Employer describes himself as single and does not list any dependents. (AF 75).

These irregularities suggest that Employer and/or its lay representative may have made material

misrepresentations during the course of this proceeding before the Department of Labor. Accordingly, we will afford Employer and his representative an opportunity to explain the circumstances, and show cause (1) why the matter should not be referred to the INS for investigation and (2) why Employer's representatives be sanctioned for the misrepresentation.

ORDER

It is HEREBY ORDERED that we **AFFIRM** the CO's Final Determination denying alien labor certification.

It is also HEREBY ORDERED that Employer show cause within ten (10) days of receiving this order why BALCA should not report the irregularities to the Immigration and Naturalization Service for investigation of fraud and willful misrepresentation. *See El Paso Marketing, Inc.*, 1997-INA-219 (April 7, 2000)(referral of possible misrepresentations to INS); *see also generally* 20 C.F.R. § 656.31(a).

It is also HEREBY ORDERED that Tadeusz Kucharski, lay representative for Employer, show cause within ten (10) days of receiving this order why BALCA should not refer his apparent unethical or improper professional conduct to the Immigration and Naturalization Service for investigation, and consider his disqualification and/or other sanctions pursuant to 29 C.F.R. §§ 18.34(g)(2), (3), and 18.36.

SO ORDERED.

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John M. Vittone
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.